In the Supreme Court
of the United States

OCTOBER TERM, 1945

No.....

C. H. WHEELER,

Petitioner,

v.

CHESTER BOWLES, Administrator of the Office of Price Administration,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the Circuit Court of Appeals was rendered on the 1st day of August, 1945 (R. pp. 371-388). The opinion is not yet officially reported.

Jurisdiction

1. The date of the judgment to be reviewed is August 1, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240

of the Code of Civil Procedure, as amended by 28 U.S.C.A. Section 347.

3. The opinion of the Circuit Court of Appeals that the discretion of the Administrator to institute treble damage actions may be delegated is in conflict with the decision of this court in Cudahy Packing Company v. Holland, 315 U. S. 357, 62 S. Ct. 651.

4. The opinion of the Circuit Court of Appeals as to the applicability of the Emergency Price Control Act is in conflict with the opinion of the Emergency Court of Appeals in Automatic Fire Alarm Company v. Bowles, 143 Fed. (2nd) 602 at page 605.

Statement of the Case

This case has already been stated in the preceding petition (pp. 1-5) which is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the discretionary authority of the Administrator to bring treble damage actions could be delegated.

2. It erred in holding that the unauthorized exercise by the District Enforcement Attorney of the suit-bringing function could be later ratified without the exercise of the personal discretion of the Administrator.

3. It erred in holding that the Emergency Price

Control Act covered booming services.

4. It erred in holding that exclusive jurisdiction vested in the Emergency Court of Appeals to determine whether the Administrator unconstitutionally discriminated against the petitioner.

5. It erred in holding that petitioner's customers were not all purchasers of the same class.

ARGUMENT

Summary of Argument

Point A. The statute does not expressly authorize delegation of the suit-bringing function. The case is controlled by the decision of this court in Cudahy Packing Company v. Holland, 315 U.S. 357, 62 S. Ct. 651, and other cases under the Fair Labor Standards Act.

Point B. The unauthorized exercise by the District Enforcement Attorney of the suit-bringing function is not subject to ratification by the Administrator without the exercise of his personal discretion.

Point C. The Emergency Price Control Act is directed to the control only of the prices of commodities and the rents of housing accommodations and services of the character here involved are not within the spirit or purpose of the Act except to the extent that they are expressly directed by the Act to be considered as commodities.

Point. D. The District Court and the Circuit Court of Appeals had jurisdiction to determine whether the Administrator unconstitutionally discriminated against the petitioner.

Point E. Petitioner's customers were purchasers of the same class.

Point "A"

THE STATUTE DOES NOT EXPRESSLY OR IMPLIEDLY AUTHORIZE DELEGATION OF THE SUIT-BRINGING FUNCTION. THE CASE IS CONTROLLED BY THE DECISION OF THIS COURT IN *CUDAHY PACKING COMPANY* v. *HOLLAND*, 315 U.S. 357, 62 S. Ct. 651, AND OTHER CASES UNDER THE FAIR LABOR STANDARDS ACT.

1. *The statutory wording does not expressly authorize delegation.*

The action is based on Section 205 (e) of the Price Control Act (50 USCA, Sec. 925 (e)), providing that in certain cases of violation of price orders *"the Administrator* may institute such action *on behalf of the United States* within such one year period." The very essence of this point is that this section vests *in the Administrator* discretionary as distinguished from purely ministerial duties and that discretionary or quasi-judicial functions may not be delegated without express statutory authority.

The severe import and discretionary character of the suit-bringing functions under Sec. 205 (e) clearly

appear from the fact that at the time the instant action was instituted (February 3,1944 - R. p. 4) the exercise of the Administrator's choice to sue amounted to the imposition of a *self executing penalty of thrice the amount of the overcharge in the event the court found an over charge to exist.* This penalty is imposed not by the court but by the Administrator because the court was powerless to reduce the treble damages even though the overcharge was in entire good faith.[1]

The discretionary character of the suit-bringing function is highlighted by the fact that by the amendment of June 30, 1944 to Sec. 205(e) the determination of the amount of damages in these cases is in so many words measured by "the discretion" of the court. What is now discretionary with the court must necessarily have been a discretionary function with the Administrator at the time this action was brought.

Cudahy Packing Company v. *Holland*, supra, is direct authority that statutory language, admittedly the same on its face as that here involved, neither directly nor impliedly warrants the delegation of a function capable of oppressive use such as this suit-bringing function. The opinion of the District Court was predicated upon the opinion in the Cudahy case. The Court of Appeals sought to distinguish it by

[1] By the amendment of June 30, 1944, to Section 205 (e), the section was changed to provide for the awarding of damages in such amount not exceeding more than three times the amount of the overcharge "as the court in its discretion may determine."

reason of a supposedly different legislative history involved in the adoption of the Fair Labor Standards Act and upon the basis that the suit-bringing function might not be as oppressive as the subpoena power. These distinctions, we shall show are without merit.

The authority of the Administrator to bring the action springs from subdivisions (a) and (b) of Sec. 201 of the Price Act. They are, in substance, the same as those contained in Sec. 4 of the Fair Labor Standards Act on which the Cudahy Packing Company opinion was based. Under the third sentence of subdivision (a), the Administrator is authorized to appoint "such employees as he deems necessary in order to carry out his functions and duties under this Act." This language goes no further than to authorize the Administrator to employ persons to *assist him in the administration of the Act.* It does not authorize him to delegate discretionary duties capable of oppressive use or of being employed, as in this case, differently with respect to persons similarly situated. It does not contemplate *the transfer of powers* but merely contemplates that the Administrator may act through others where administrative or ministerial acts are involved. The fifth sentence of subdivision (a) stating that "Attorneys appointed under this section may appear for and represent the Administrator in any case in court" neither authorizes the delegation of the suit-bringing function nor empowers the enforcement attorneys to institute suit

under Sec. 205(e). The meaning is that *in a properly instituted suit* counsel appointed by the Administrator may appear for him. Otherwise, the Administrator would be represented in treble damage actions by the traditional law enforcement officer of the government, the United States Attorney.

The first sentence of subdivision (b) of Sec. 201, providing that the administrator "or any duly authorized representative may exercise any or all of his powers in any place" is definitive of the geographical jurisdiction of the Administrator rather than of his powers of delegation. This was expressly decided in Cudahy Packing Company v. Holland, 315 U.S. 357, 62 S. Ct. 651.

2. *Cudahy Packing Company v. Holland*, 315 U.S. 357, 62 S. Ct. 651, *and other Fair Labor Standards Act cases are controlling.*

The opinion in Cudahy Packing Company against Holland is to the effect that under the provisions of Sec. 4 of the Fair Labor Standards Act (29 U.S.C.A., Sec. 204), the Administrator of the Wage & Hour Division of the Department of Labor may not delegate to a regional director the subpoena duces tecum function. The function was held to involve "administrative judgment and discretion which the Act has in terms given only to him (Administrator)", to be a "power capable of oppressive use especially when it may be indiscriminately delegated" and not subject

to carte blanche delegation. The statute construed in the Cudahy case is identical to Secs. 201(a) and (b) of the Price Act but for a difference which is not claimed to be of any moment here. The holding of the decision is directly contrary to that of the Circuit Court of Appeals in this case. The Circuit Court said that "The legislative history in the Cudahy Packing Company case demonstrated a Congressional intent not to delegate the subpoena power; the legislative history in the present case affirmatively shows that the power to delegate the suit-bringing function was intended." A reading of the Cudahy opinion will disclose that the "legislative history" referred to in that opinion was only relied on as "fully supporting" (p. 362) the court's conclusion that the Act itself denied the delegation. The legislative history of the Fair Labor Standards Act did not at all inhere in nor was it a necessary part of the court's conclusions in that case. The statement of the Circuit Court of Appeals that the legislative history of the Price Act is such as to show Congressional intent to delegate the suit-bringing function is predicated upon a "section analysis" of Sec. 201(a) and (b) by the Senate Committee on Banking and Currency which only purports to analyze rather than to construe or interpret the meaning of this section.

The statement in the opinion sought to be reviewed that "the suit-bringing function may well not be as oppressive as the power to issue a subpoena which is

not returnable before a judicial officer" loses force when it is borne in mind that the *mere exercise of the suit-bringing choice by the Administrator amounts to* the *exaction of the penalty for thereafter (prior to the amendment) there might have been no diminution of the treble damage exaction.*

The subpoena power involved in the Cudahy case is not as heavy an instrument of enforcement as the suit-bringing function. No contempt penalty can be incurred for disregarding a subpoena without court order. The treble damage action in a practical, if not a legal, sense involves the imposition of a penalty by the mere starting of the suit. In the case of a person of limited means, the mere institution of suit, however ill-founded, may deprive him of his property by adversely affecting his credit.

The Circuit Court of Appeals for the First Circuit in *Lowell Sun Co. v. Fleming,* 120 F. (2d) 213 (C.C.A. 1st, 1941, affirmed 315 U.S. 784, 62 S. Ct. 793), and the Circuit Court of Appeals for the Tenth Circuit in *Minnesota Mines, Inc. v. Holland,* 126 F. (2d) 824 (C.C.A. 10th, 1942), have held that under Sec. 4 of the Fair Labor Standards Act the subpoena function was discretionary in character and could not be delegated to a regional director by the national Administrator under a blanket order similar to that which was the vehicle of delegation in this case.

3. *The right to delegate the suit-bringing function may not be implied in the instant case.*

In *Cudahy Packing Company v. Holland,* supra, it was held not only that authority to delegate was not expressly granted by the language of the act there being construed but that the right did not flow by necessary implication from the language or the necessities of the case. This conclusion flows from the general principle of agency expressed in the maxim *"delegatus non potest delegare".* It is well established that an agent may delegate merely ministerial functions to assistants whose employment is authorized but that an agent has no authority to delegate acts discretionary or quasi-judicial in nature (42 Am. Jur. 387; Restatement of the Law—Agency (Am. Law Institute) Sec. 78).

Is the suit-bringing function authorized by Sec. 205(e) and lodged in the Administrator merely a ministerial function or does it involve discretionary judgment of a high order? The answer to this question goes to the root of the point we make. The very fact that under the amendment of June 30, 1944, *the determination of the amount of the penalty to be exacted was lodged in the "discretion" of the court*—rather then left to the judgment of the Administrator—*would seem a conclusive answer to this question.* The penalty features of the treble damage action go further than merely the exaction of treble damages for money paid by defendant in compromise of a Sec. 205(e) suit or in satisfaction of a judgment

therein and legal expenses and costs incurred by the taxpayer in connection therewith are not deductible from gross income as business expenses for Federal income tax purposes. Had it been the intention of Congress to give authority to the Administrator (who is appointed by the President, with the advice and consent of the Senate) to parcel out the use of such a delicate function to the many district enforcement attorneys in the country (there are eighty-nine district offices) who might employ it with varying degrees of severity or leniency, it would certainly have said so. The harsh and discriminatory application of Sec. 205(e) penalties would not have been resorted to in this case or for example in *Bowles, Administrator v. Brannagan,* 60 F. Supp. 897 (D.C. Neb., June 16, 1945) or in *Rainbow Dyeing and Cleaning Co. v. Bowles,* 150 F. (2d) 273, 279 (U. S. Court of Appeals, D.C.) had the respondent adhered to the statutory requirement that he exercise personal judgment with respect to the suit-bringing function.

4. *The pattern of contemporary legislation is inconsistent with the existence of the implied power.*

An analysis of recent Congressional enactments is persuasive of the Congressional intent to permit the delegation of discretionary duties only when an authority to delegate is expressly granted. Among such enactments expressly authorizing the delegation by the Administrator or administrative board in charge

of discretionary acts are the thirteen Acts set out at pages 8, 9 of the petition.

These instances in which Congress has seen fit to make express provision for the delegation of discretionary functions "indicate that Congress intended that the power should be delegated only when it explicitly so provided and, conversely, that it should not be delegable when it did not so provide," *Lowell Sun Co. v. Fleming,* 120 F. (2d) 213, 216, (1st C.C.A. 1941), 62 S. Ct. 793.

Point "B"

RATIFICATION REQUIRED THE PERSONAL DISCRETION OF THE ADMINISTRATOR.

It was agreed between the parties hereto[1] and found by the district court[2] that the bringing of this action was not authorized by the named plaintiff but that it was brought on the sole authority of the enforcement attorney of the respondent's district office at Portland, Oregon, without the exercise of any discretion by the Administrator. It is not claimed that the Administrator at any time thereafter and up to the present time has ever exercised any personal judgment with respect to this case. On September 7, 1944 (just one month after the entry of judgment of dismissal in this case), Second Revised Order No. 3[3]

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[1] Pre-trial Order Agreed Facts, R. 18.
[2] Par. 1, Findings of Fact, R. 28-29.
[3] Federal Register, Vol. 9, No. 181, p. 11137.

was issued by the Administrator in which the Administrator undertook to ratify "all acts done . . by an attorney at law regularly admitted to practice in any state . . . *purporting to act in the name or on behalf of the Price Administrator in any suit . . . said ratification,* approval and confirmation to have the same force and effect *as if specific authority to institute and conduct such suit . . .* had been expressly granted by the Price Administrator."

This is nothing more than a blanket ratification of unknown acts of district enforcement attorneys or any attorney "purporting to act in the name" of the Price Administrator. *It constitutes no ratification or adoption of the institution of the present action by the district enforcement attorney because on the record the instant suit and the action of the enforcement attorney in bringing the same has not yet been placed before the Administrator for his judgment.*

Ratification of what? The judgment of the district enforcement attorney who brought this action? Certainly not. For the Administrator has not yet been advised of the nature of the action, the parties thereto or the circumstances which induced the institution of the same.

The Administrator cannot ratify that which he could not originally authorize. Under the statute he could not have authorized the district enforcement attorney to institute this action as an independent act—now the Administrator cannot ratify that un-

authorized act without exercising the independent personal judgment with respect to the suit-bringing function which Congress imposed upon him.

Moreover, the attempted ratification is general in terms, does not apply particularly to the instant case, and it does not appear that it was made with knowledge of the existence of the instant case. In this situation the doctrine announced in 43 Am. Jur. page 74, and fully supported by the cases cited in the notes to that text, is applicable. "An act of ratification to be effective, must be direct, explicit, unequivocal, and with full knowledge of the facts."

The Circuit Court of Appeals held that this blanket ratification of undesignated suits was adequate to support the instant case "independently of such adminstrative delegation under the statute". This reasoning, we submit, begs the question. If the Administrator did not have authority under the statute to delegate in the first instance he could not accomplish by ratification *ex post facto* what he was not authorized to authorize directly before the performance of the act.

Furthermore, a ratification could not be accomplished on September 7, 1944, for the cause of action had at that time failed as to all alleged violations occurring more than one year prior to that date. The alleged violations of the act occurred between February and October 1, 1943 (R. 3). Inasmuch as an action under Sec. 205(e) must have been brought within one

year from the date of the alleged violations it was too late in September, 1944, to attempt to ratify the action as to any alleged overprice transactions occurring before September, 1943. A statute which in itself creates a new liability, gives an action to enforce it unknown to the Common law, which fixes the time within which that action may be commenced, *is not a statute of limitations.* It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. (*Walsh vs. Mayer,* 111 U.S. 31; *U. S. ex rel. Texas Portland Cement Co. vs. McCord,* 233 U.S. 157; *Midstate Co. vs. Penna. R. Co.,* 320 U.S. 359, 363-367.)

Point "C"

APPLICABILITY OF THE ACT TO PETITIONER

The term "commodity" includes services rendered otherwise than as an employee "in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity". (50 U.S.C.A. Sec. 942 (c)). Except as included in the foregoing definition, services are excluded as they are not commodities in the ordinary

and accepted meaning of that term. *Automatic Fire Alarm Company v. Bowles,* 143 Fed. (2d) 602, at page 605, Emergency Court of Appeals. Booming is not expressly named as a service to be included in the term "commodity". Since this is an action for a penalty, the language of the definition is to be strictly construed.

Bowles v. Farmers National Bank, decided by the Circuit Court of Appeals for the Sixth Circuit, 147 Fed. (2d) 425, involved a question of whether an action for treble damages abated on the death of a defendant or could be continued against his administrator. The court concluded that the statute was penal and the action abated. To the same effect *Bowles vs. Silverman,* 57 Fed. Supp. 990, *Bowles v. Nasif,* 58 Fed. Supp. 644, and *U. S. v. Siegel Bros.* (Judge Schwellenbach), 52 Fed. Supp. 238.

Dictionary definitions of "processing" and "distribution" show that these terms are inapplicable to the services rendered by the petitioner. So also "storage" for the reason that logs are not stored at petitioner's booming site nor is any charge made for storage. Likewise that part of the definition including "installation, repair, or negotiation of purchases or sales of a commodity" is clearly inapplicable to the character of services rendered by the petitioner. The remaining part of the definition includes services rendered "in connection with the operation of any service establishment for the servicing of a com-

modity". This language contains several elements. First, it must be in connection with the operation of a service establishment; second, this service establishment must be for the purpose of servicing a commodity; and third, it must involve a service to the commodity.

In *Guess v. Montague,* 140 Fed. (2d) (C.C.A. 4) 500, at 503, the court, in a case under the Fair Labor Standards Act, said:

> "In Bracey v. Luray, 4 Cir., 138 F. (2d) 8, this day decided, we hold that a retail establishment within the meaning of the exemption is one which sells in small quantities to the ultimate consumer. On the principle noscitur a sociis, the 'service' establishment contemplated by the exemption must be of the same sort as the 'retail' establishment therein referred to, i. e., it must be one 'selling services to consumers', and this is the clear intimation of the Supreme Court. A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 526, 62 S. Ct. 1116, 1121, 86 L. Ed. 1638. As suggested by the Circuit Court of Appeals of the Second Circuit in Fleming v. Arsenal Building Corporation, 2 Cir. 125 F. (2d) 278, 280, we think that the exemption 'should be limited to those who serve customers directly, like tailors, or garages, or laundries'. Other illustrations of service establishments within the meaning of the statute have been given as 'barber shops, beauty parlors, shoeshining parlors, clothes pressing clubs, laundries, automobile repair shops, or the like.' Wood v. Central Sand & Gravel Co., D.C. 33 F. Supp. 40, 47; G. Fleming v. A. B. Kirschbaum Co., 3 Cir. 124 F. (2d) 567, 572."

The term "service establishment" has thus been defined in *Strand v. Garden Valley Telephone Co.,* 51

F. Supp. 898, at 903:

> "In its broad sense the term 'service establishment' includes public utilities such as railroads, gas and electric companies, and similar organizations. In its narrower sense the term is applicable to a different class of business such as hotels, garages, barber shops, laundries, tailor shops and the like. That the exemption clause to which I have just referred applies only to the latter class, or to the term in its narrower sense, is supported by: Stucker v. Roselle, D.C. Ky., 37 F. Supp. 864, 867; Fleming v. A. B. Kirschbaum Co., 3 Cir., 124 F. (2d) 567, 572, affirmed sub nomine A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 526, 62 S. Ct. 1116, 86 L. Ed. 1638, and Interpretative Bulletin No. 6 issued by the United States Department of Labor, Wage and Hour Division, in June, 1941."

The fact that a part at least of the language in the Price Control Act was borrowed from the Fair Labor Standards Act gives play to the doctrine of Hecht v. Malley, 265 U.S. 144, 44 S. Ct. 462, 465, 68 L. Ed. 949, that Congress must be considered "to have adopted also the construction given by this Court to such language."

From the foregoing definitions it is obvious that petitioner did not operate a service establishment nor did he service any commodity. It is equally clear that petitioner did not sell services rendered in connection with the processing, distribution, storage, installation or repair of any commodity. This is true even when the terms are used in a broad sense. Booming is not expressly named as a service to be included

in the term "commodity" nor does it fall within any of the services which are expressly included. It is therefore not within the Act.

Point "D"

JURISDICTION AS TO DISCRIMINATION

The exclusive jurisdiction vested in the Emergency Court of Appeals is to determine the validity of regulations or orders issued by the Administrator (Section 204 (d). While the petitioner has questioned the applicability of the regulation he has not nor does he question its validity. His attack is upon discriminatory enforcement.

Under the record, the respondent with knowledge of the similar and identical operations of the petitioner and Scott Rafting Company lowered the rates of one and increased the rates of the other and instituted a penalty action against one but not against the other. It is true that respondent contended that since another agency of the government, that is, the Reconstruction Finance Corporation, controlled Scott Rafting Company, a penalty action would be futile. This is to say that an agency of the government is without responsibility for violation but not so the citizen.

In Yick Wo v. Hopkins, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064, an ordinance of San Francisco which discriminated against Chinese laundrymen in fact,

although on its face it was general in its application, was held to deprive Chinamen of due process and the equal protection of the law. We quote from page 227 of the Law Edition:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This doctrine was recognized in an OPA case, *Steuart & Bro. v. Bowles,* 322 U.S. 398, 88 L. Ed. 1350, 64 S. Ct. 1097, although the court found the facts did not amount to discrimination. Incidentally, this is an illustration of the jurisdiction of district courts and circuit courts of appeal in cases like this.

The Yick Wo case involved the Fourteenth Amendment limiting the power of states, but of course the same interpretation is given the Fifth Amendment limiting the power of the federal government. 12 Am. Jur. 258, 16 C.J.S. 1150-2.

In *General Oil Co. v. Crain,* 209 U.S. 211, 52 L. Ed. 754, the plaintiff sought an injunction against a Tennessee oil inspection tax. It was contended by the defendant State Inspector of Oils, that on its face the statute was constitutionally valid. The Court held that it was not sufficient that the statute on its face be valid and pointed out that cases were numerous where tax laws of a state which in their general

and proper application were perfectly valid had been held to become void in particular cases either as unconstitutional regulations of commerce or as violations of contracts prohibited by the constitution or because in some other way they operated to deprive the party complaining of a right secured to him by the constitution of the United States. The court concluded that it was the right of a party to be protected against a law which violated a constitutional right, whether by its terms or by the manner of its enforcement.

Brown v. Mars, 135 Fed. (2d) 483, referred to in the opinion of the Circuit Court of Appeals (R. p. 384) is not in point because this constitutional question was not raised. In that case there was no finding of any intentional discrimination or of any discrimination at all. There was no finding of identity or even similarity between the Mars Co. and other sellers of candy bars or between the products of the Mars Co. and other candy bars. In addition, an examination of the opinion of the Administrator in the Peter Paul, Inc. case, Docket No. GF 3-2794, which is referred to in the Mars opinion, shows that not only did the Administrator not create a discrimination in favor of Peter Paul, Inc., but instead he permitted a reduction in the weight of its candy bar for the express purpose of removing a discrimination in favor of its closest competitor.

Point "E"

THE "CLASS OF PURCHASER" PROVISION

As discussed in "Reasons Relied on for the Allowance of the Writ", the service to the nine customers involved in this action was the same, that is, unloading logs from railroad cars and assembling the logs into log rafts (R. p. 15). The District Court heard the testimony as to the manner in which petitioner established rates. The court found that all of the petitioner's customers during March 1942 and during the period from February 1, 1943, to and including September 30, 1943, were purchasers of the same class (R. p. 31). The finding of the court involved a factual question. Such a finding is not to be disregarded unless it is clearly and manifestly wrong. *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U.S. page 30, 63 L. Ed. 447, at page 459.

It is true that the General Counsel for the Office of Price Administration interpreted the definition contained in the regulation to authorize classes based not only upon difference of service but also upon difference of charge. Office of Price Administration Service, 11:968 and 969. But can it be said that this interpretation is more bindng than the interpretation contained in the manual issued by the Administrator of the Office of Price Administration entitled "What Every Retailer Should Know About the General Maximum Price Regulation"? In that manual it

was expressly stated that the mere fact that a retailer may have sold merchandise to a particular customer during March at a price lower than the price he charged other customers did not necessarily make that purchaser a separate class of purchaser. General Maximum Price Regulation Bulletin No. 2 (May 1942) p. 3. The language of the definition contained in the regulation prior to its amendment in 1944 clearly justified the construction placed upon it by the District Court.

In *Rainbow Dyeing & Cleaning Co. v. Bowles,* 150 Fed. (2d) 273, at page 279, in the *per curiam* opinion it was stated that the regulation was capable of being honestly and reasonably understood in the sense for which the appellant in that case contended. In that case the appellant persisted in its questioned charges after two notifications from the Office of Price Administration that prices charged, as well as services rendered, established a purchaser class. Here the petitioner not only restored his rates within a reasonable time to the March 1942 level (R. Agreed Facts p. 17) but offered to refund to his customers the claimed overcharges (R. p. 334).

The District Court was not bound to accept any of the interpretations of the "purchaser clause" made by the Administrator. As said by Circuit Judge Minton in Bowles, Adminstrator v. Simon (C.C.A. 7) 145 Fed. (2d) 334, at page 337:

> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 325, 53 S. Ct. 350, 77 L. Ed. 796; Bowles v. NuWay Laundry Company, 10 Cir., 144 F. (2d) 741."

If petitioner's customers are purchasers of the same class the overcharges would be negligible. If, however, petitioner is bound by the amendment made after the alleged violations (9 F. R. 7443) (1944) the overcharges are to him substantial, in addition to costs, and very likely the inability to take any payment made to the Administrator as an income tax deduction.

As said by Associate Justice Arnold in his dissenting opinion in *Rainbow Dyeing & Cleaning Co. v. Bowles,* 150 Fed. (2d) 273, at page 279:

> "One of the purposes of judicial review of administrative decisions is to obtain final interpretations of law and regulations. But another and equally important purpose is to insure fairness of administrative action."

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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